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AUG 10 1965
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No. 441

IN THE SUPREME COURT OF THE UNITED STATES

GENE DOWNING,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

GENE DOWNING, Petitioner,
By his Attorney,
H. G. BILL DICKEY,
The Law Building,
500 West 7th Street,
Tulsa, Oklahoma.

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1965

GENE DOWNING,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, GENE DOWNING, a resident of the State of Oklahoma, was convicted on May 7, 1964, in the United States District Court for the Western District of Texas, El Paso Division, on all ten counts of an indictment returned in that jurisdiction.

The defendant was charged on nine consecutive counts of violating Title 18, U. S. C. 2314, each of the nine counts charging unlawful transportation of a forged security from El Paso, Texas, to San Francisco, California.

The tenth count charged the defendant with violation of Title 18 U. S. C. 371, or in substance, a conspiracy alleged to have occurred in the State of Oklahoma.

The defendant was sentenced to a term of five years imprisonment. This judgment and sentence was appealed to the Court of Appeals for the Fifth Circuit, and upon July 12, 1965, the said Court of Appeals affirmed said judgment and sentence.

The Petitioner herein asks the Supreme Court of the United States to review the judgment and sentence in this cause for the reason that an issue is contained in this case upon which the Petitioner states, has never been decided by this honorable court.

Specifically, the Petitioner seeks this Writ of Certiorari for a determination of the effect and the applicability of Federal Court Rule No. 43, which reads as follows:

> "The defendant shall be present at the arraignment at every stage of the trial, including the impaneling of the jury and the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence, shall not prevent the continuing of the trial to and including the returning of the verdict. A Corporation may appear by counsel for all purposes. In prosecution for offenses punishable by fine or imprisonment, for not more than one year, or both, the Court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence. The defendant's presence is not required at the reduction of sentence under Rule 35."

During the deliberation of the jury in this cause, there was communication upon at least three occasions

with the jury by the Court and bailiff without the knowledge or presence of either this defendant, nor his counsel. On Pages 321, 322 and 323 of the record it was made to appear clear that without the presence of either the defendant, nor his counsel, the jury was recessed for lunch and reconvened by the Court after lunch and the circumstances surrounding these two contacts with the jury were unknown to the defendant and his counsel, even though they were readily available outside the court room door.

The record further shows on the above named pages that the jury had sought the exhibits in the case, and apparently the exhibits were taken to the jurors who were deliberating on another floor of the said court house. Counsel, nor the defendant, were given an opportunity to examine, or to see exactly what instruments, whether exhibits or not, were furnished to this jury while deliberating his fate. Petitioner believes that the purpose of Rule 43 and the construction thereof is so clear that there can be no other interpretation of the rule, except that Congress meant exactly what it said when the law was enacted as the presence of the defendant "at every stage of the trial, including the impaneling of the jury and the return of the verdict . . .", certainly it anticipates that the deliberation of the jury is the most important part of the proceedings and that failure of the court to permit the defendant and his counsel to be present when any communications with the jury were had, constitutes reversable error that can not be waived.

Certainly, in this case there was no waiver of any rights, but the court arbitrarily handled the jury as it

saw fit during its deliberation. This is particularly true in this case that the rights of the defendant should have been preserved for the entire record discloses that the defendant had never been in the State of Texas nor to California during the times alleged in the indictment, nor did he communicate with any person in the areas charged in the indictment.

It is particularly true that this was known to the prosecuting officials in Texas. In addition to this, the defendant was refused a motion for a bill of particulars, and was refused a list of witnesses on Page 31 of the record, wherein both of these motions were renewed by defendant's counsel immediately before trial.

THEREFORE, this defendant, a resident of the State of Oklahoma, was put to trial in a jurisdiction where he had never been, and charged with a ten count indictment, and at the time the jury was impaneled, he did not know what witnesses would testify against him, which made it impossible for him to defend himself.

THEREAFTER, as set forth above, the court chose to communicate with and handled the jury arbitrarily and we believe same to be directly contrary to Federal Court Rule 43, *supra,* and that by reason thereof, that the defendant's rights were violated and made it impossible to insure fairness of his trial and particularly the fairness of the deliberations of the jury. It is important to note that even though these communications were had by the trial court with the jury that the record was completely silent as to these communications until the record was

perfected by defendant's counsel. There is no way for anyone to know exactly what was said and done in the presence of the jury, because the same was not reported by court reporters, and any attempt to reconstruct this matter would be purely guess-work on the part of anyone, and we believe that Federal Court Rule 43 requires more than this for the preservation of a defendant's rights.

WHEREFORE, the defendant, GENE DOWNING, respectfully requests that this honorable court grant and issue its Writ of Certiorari, ordering the entire record transmitted to said court for its determination.

GENE DOWNING, Petitioner,
By his Attorney.
H. G. BILL DICKEY,
The Law Building,
500 West 7th Street,
Tulsa, Oklahoma.

CERTIFICATE OF SERVICE

I, H. G. BILL DICKEY, certify that I, on this 9th day of August, 1965, did place a copy of the above and foregoing instrument, being a true and correct copy, in the United States mail, addressed to United States Attorney, Western District of Texas, El Paso Division, Federal Courts Building, El Paso, Texas, and, an exact copy mailed to the Clerk of the Court of Appeals, Fifth Circuit, Room 408, 400 Royal Street, New Orleans, Louisiana, with air mail postage thereon being fully prepaid.

H. G. Bill Dickey